UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 11

THE GOODYEAR TIRE & RUBBER COMPANY,[1]
Employer

and Case No. 11-RD-666

LLOYD DEWAYNE MYERS, an Individual
Petitioner

and

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, [2]

Union

REGIONAL DIRECTOR'S DECISION AND ORDER

The Employer, The Goodyear Tire & Rubber Company (hereinafter "the Employer"), is an Ohio corporation with a mold plant located in Statesville, North Carolina, where it is engaged in the business of manufacturing tires and related rubber products. During the week of February 9, 2004,[3] the Employer voluntarily recognized the United Steelworkers of America, AFL-CIO-CLC (hereinafter "the Union"), as exclusive bargaining representative of all hourly production and maintenance employees at the Employer's Statesville plant, excluding office clerical and technical employees, crew leaders, maintenance leader, mold specialists, shipping and receiving employees, contractors, guards, professional, managerial and confidential employees, and supervisors as defined in the National Labor Relations Act.[4]

[1] The Employer's name appears as amended at the hearing.
[2] The Union's name appears as amended at hearing.
[3] All dates herein are 2004, unless otherwise noted.
[4] The unit description appears as set forth in the parties' collective bargaining agreement and as amended at hearing. At the hearing the parties stipulated that the unit is appropriate.

The Petitioner filed a decertification petition on September 3, seeking to decertify the Union as the collective bargaining representative for the unit described above. In dismissing this petition, the undersigned found that a question concerning representation did not exist, because a reasonable period of time for bargaining had not elapsed following the Employer's voluntary grant of recognition. Upon review of the Region's decision to dismiss, the Board reversed and remanded the case for a hearing on the issue whether a reasonable time had elapsed since the Employer granted recognition to the Union.[5] Thereafter, on November 30, pursuant to the Board's remand order, a hearing officer conducted a hearing.[6] The Union and Petitioner filed briefs which have been carefully considered.

At issue here is whether the Employer's voluntary recognition of the Union during the week of February 9 bars the decertification petition filed on September 3, based on a finding that a reasonable time to bargain had not elapsed at the time that the petition was filed. The Union argues that a reasonable time to bargain had not yet passed when the petition was filed, and the Petitioner argues to the contrary. The Petitioner further argues that voluntary recognition should not, as a matter of law, serve as a bar to the filing of a decertification petition. It further asserts that the Union has not met its burden of establishing that the Employer voluntarily recognized it based upon a showing of majority support, so as to trigger the bar doctrine in this case.

I have considered the evidence and arguments presented by the parties. As discussed below, I conclude that a reasonable time to bargain had not yet passed at the time the decertification petition was filed. Further, the record establishes that the Employer voluntarily

[5] I take administrative notice of the Region's September 21, 2004 dismissal letter, which was not included in the record.

[6] On December 8, the Petitioner filed a Motion to Admit Evidence into the Record and to Close the Record in the present case. On December 10, the Acting Regional Director issued an Order to Show Cause for Petitioner's Motion to Admit Evidence and to Close the Record. No party responded, and, accordingly, Petitioner's motion was granted, and the record was closed on December 21.

recognized the Union based upon a showing that a majority of unit employees supported the Union. Finally, settled Board authority provides no support for the Petitioner's novel argument that the bar doctrine should not be applied in this case as a matter of law. Accordingly, I find that the Employer's voluntary recognition acts as a bar because the parties had not had a reasonable time to bargain, and I shall, therefore, dismiss the petition.

To provide a context for my discussion of this issue, I will first provide a summary of the collective bargaining negotiations between the Employer and the Union. Next, I will set forth the applicable legal principles in this area. Finally, I will provide a detailed analysis and set forth my conclusions concerning the issues presented.

I. FACTS

A. Background

The Employer and the Union are parties to a Master Agreement covering some of the Employer's plants in Ohio, Alabama, Nebraska, Kansas, Tennessee, Virginia, and Wisconsin. Within the Master Agreement, Letter 50 sets out the parties' various commitments concerning any Union organizing campaigns that may be conducted at the Employer's unrepresented facilities, as well as the procedures to be followed thereafter for voluntary recognition and contract negotiations.

More specifically, Letter 50 provides that the Employer will remain neutral during any Union organizing campaign, and that it shall voluntarily recognize the Union upon a showing through a card-check procedure before an arbitrator that a simple majority of bargaining unit employees have signed authorization cards designating the Union as their exclusive representative. Letter 50 provides further that, following voluntary recognition, the Employer and the Union shall meet within 14 days to start negotiations for a first collective bargaining agreement, and that if the

parties are unable to reach a collective bargaining agreement within 90 days after recognition, they "shall submit those matters that remain in dispute to the Chair of the Union negotiating committee and the Chair of the Company Negotiating Committee, who shall use their best efforts to assist the parties in reaching a collective bargaining agreement." Finally, Letter 50 provides that "[i]f after thirty (30) days following the submission of outstanding matters the parties remain unable to reach a collective bargaining agreement, the matter may be submitted to final offer interest arbitration in accordance with procedures to be developed by the parties."

B. The Employer's Voluntary Recognition of the Union at the Statesville Plant

The Union conducted a campaign at the Employer's Statesville mold plant beginning around November 2003. On February 2, pursuant to the provisions of Letter 50, the Union informed the Employer that it had received authorization cards from a majority of unit employees. During the week of February 9, an arbitrator certified through a card check that the Union had obtained a majority of authorization cards, and the Employer thereafter recognized the Union as the exclusive representative of the unit employees.[7]

C. Preparations for Collective Bargaining

The Union took the initial position that the Statesville facility should be included under the

[7] The arbitrator's certification appears to have occurred on February 11, but the record does not disclose the exact date upon which the Employer recognized the Union. Letter 50 provides that "[i]f the neutral determines that a simple majority of eligible employees has signed cards . . . then the [Employer] shall recognize the Union as the exclusive representative of unit employees without a secret ballot election conducted by the National Labor Relations Board." Based on the above, I find that the Employer voluntarily recognized the Union during the week of February 9.

Master Agreement, but the Employer did not agree. Accordingly, it was necessary for the parties to negotiate an initial agreement. In order to prepare for these negotiations, the Union held membership meetings throughout the month of March, to identify the specific problems at the facility, to formulate proposals to address those specific problems, and to select employee members for the Union's negotiating committee. Complicated operational logistics required multiple meetings to accomplish these tasks, as the plant operated on a continuous production schedule of four 12-hour shifts, under which employees worked both day and night shifts on a rotating schedule.

The Union negotiating committee was comprised of union officials Frank Buzaki and Kevin Johnsen, and the four elected employee representatives. The Employer's negotiating team included company officials Richard Hense, Patti Celestine, Pat Burns, and Dan Oberlin. Buzaki and Hense were the chief negotiators for the Union and the Employer, respectively**.**

D. Initial Negotiations

On March 18, the parties met to decide upon locations, meeting times and ground rules for the negotiations. In regard to locations and meeting times, the parties agreed that bargaining sessions would take place in Statesville, which meant that Union representatives Buzaki and Johnsen and Employer representative Hense would have to travel to Statesville from other locations for the bargaining sessions. The parties also agreed that negotiations would be held on only three days a week—Tuesday, Wednesday, and Thursday—in order to accommodate the Employer's continuous production schedule.

In regard to ground rules, the parties agreed to resolve non-economic issues first before negotiating economic issue such as wages, insurance benefits, pension, and vacation pay. They agreed to share information with each other before releasing information concerning negotiations

to third parties. They further agreed, in reference to the 90-day target embraced by the Master Agreement, that they would continue talking on the 9lst day if they had not yet reached agreement, but were still making progress. The parties set their first substantive negotiation sessions for April 13, 14 and 15.

E. The Contract Negotiations Prior to September 3

In this section I will first provide a brief overview of the relevant negotiation sessions, after which I will provide a summary of the specific content of the sessions.

1. Overview

The parties met for negotiation sessions a total of 19 days between April 13 and the date on which the petition was filed, September 3. The bargaining sessions generally started at 8 or 9 a.m. and lasted until late afternoon. The frequency of the negotiation sessions diminished dramatically during July and August, when there were no face-to-sessions at all, and only one telephonic bargaining session, due to the lead company negotiator's undergoing medical treatment for a serious illness. Nevertheless, as set out more specifically below in the summary of bargaining, during this period the parties achieved agreement in several areas, including the grievance procedure, management rights, reporting pay, nondiscrimination clause, jury duty pay, funeral pay, union bulletin boards, policies and procedures, journeyman cards, employee savings plan, and a stated commitment to a high performance organization. Even more significant, during this period the parties engaged in lengthy and substantive bargaining on the issue of changing the work schedule from rotating shifts to fixed shifts, a complex area that was of critical importance to the Union, and had come close to a complete agreement on this issue by the end of August. I will now provide a brief summary of the bargaining sessions that took place between April 13 and September 3.

2. The Bargaining Sessions

At the parties' first bargaining session on April 13, the Union and the Employer each made opening remarks regarding their expectations for negotiations. The Union identified the impact of the current 12-hour shift schedule, which required that employees work alternating day and night shifts within a ten-day period, as a major concern for employees. The Employer noted that it had a good relationship with the Union, that it wanted to keep costs at the same level as in 2003 to help ensure job security, and that it believed that there was a lot to cover in these initial contract negotiations. The Union then presented the Employer with non-economic proposals relating to preamble/recognition, scope of agreement, management rights, union-shop checkoff, grievance procedure, and seniority provisions. The Employer did not present any proposals of its own that day, and stated that it wanted to review the Union's proposals.

Thereafter, during the bargaining sessions on April 14 and 15, the Union tendered additional non-economic proposals to the Employer, and the Employer presented a comprehensive counterproposal to the Union on non-economic issues. The Employer also provided the Union with certain information that the Union had requested, and the parties discussed plant policies at some length. The parties set their next bargaining sessions for the following week.

The parties met again on April 20, 21 and 22. During these sessions the parties exchanged counterproposals relating to the grievance procedure. The parties also engaged in substantial discussion of shift schedules, with the Union's proposing a 12-hour fixed-shift schedule under which employees would work either day or night shifts, but not both, and could vote on the preferred shift schedule prior to any implementation. By the end of these three sessions, the parties had tentatively agreed to two contract sections, namely, scope of the agreement and

management rights clauses, and had further agreed to continue discussing the shift-schedule issue. They agreed to meet again the following week.

The parties met again on April 27 and 29. During these sessions they reached tentative agreement on a grievance procedure, and the Union offered its counterproposals concerning seniority, overtime pay, safety and health. The parties also discussed a variety of topics, including procedures relating to reporting pay, the discipline procedure, and the potential transition to a fixed-shift schedule. In regard to the latter, the parties discussed the ways in which a fixed-shift schedule could work from both a production and operational standpoint. The parties set their next bargaining sessions for the middle of May in order to accommodate the vacation schedules of both the Union and Employer representatives.

The next bargaining sessions took place on May 18, 19 and 20. The parties initially discussed the Union's counterproposals from the previous session and then discussed their differing perspectives on the elements of an initial contract. That is, the Employer stated that a first contract should reflect the status quo and that the burden was on either party seeking to change the status quo to provide persuasive reasons for doing so. The Union contended that it was more appropriate to look to other "first contracts" between the parties as the benchmark. The parties then discussed the specific issues of cross training, plant certifications, temporary and permanent job movement, training, and the potential shift-schedule change. In regard to the latter, following the Union's stressing the significance of this issue, the parties engaged in an extensive discussion concerning methods that could be used for employees to vote on whether they wanted a fixed-shift schedule, as well as the logistics and impact of implementing that schedule.

On May 20, the Employer agreed to draft a letter encompassing the previous days' discussions concerning the fixed-shift schedule, and the parties engaged in further discussion on the issue. The Employer also offered counterproposals to the Union on clauses including safety, military pay, union bulletin boards, nondiscrimination clause, and journeyman's card, as well as a proposal on overtime computation. The Employer told the Union if it had any problems with any existing plant policies, the Employer was willing to talk about them. The parties then agreed to meet next on June 8, as both sides wanted some time to consider the positions that had been discussed.

Thereafter, on May 28, the Employer provided the Union with a letter that was designated by the parties as Letter #1, setting out the parties' conceptual discussions concerning the proposed change to a fixed-shift schedule. The preface of Letter #1 provides that "during the course of initial contract negotiations the topics of shift schedules and labor movement were discussed at length" and states that the summary contained therein "capture[d] the understandings reached between the parties." The letter then describes in detail various aspects of the proposed shift change, including the manner in which voting would take place on whether employees wanted the changed schedule and, if so, what the shift starting times would be; the timing of the implementation of the changed schedule; the ways in which seniority and labor movement would operate; and the impact of the changed schedule on voluntary work assignments, cross training, job posting requirements, and the capacity for flexibility in the workforce.

The parties' next bargaining session took place on June 17, as the Employer had requested an extension in order to put together a comprehensive package of non-economic and economic proposals. During this session, the Union said that it had almost completed its non-economic package, and that it was in the process of preparing its economic package, which it would

verbally present to the Employer when it provided its written non-economic package. The Employer responded that it would wait to present its full package, as the Union was not ready to present its economic package, but that it would provide its non-economic package to the Union on June 21. The Employer indicated that management had some concerns about the fixed-shift schedule, but that it had every intention of honoring the spirit of the discussions that had taken place, as long as the Union was willing to support the idea of a flexible workforce. During a discussion of the provisions of Letter 50 that dealt with ratification of the contract, and how that would operate if issues were unresolved at the local level and then "moved up the ladder" to either the Union and Employer chairs or to arbitration, the Union noted that such a move was dangerous as both sides would then lose control of their final positions.

The parties met again on June 21, 22, and 23. In the first session, the Employer provided the Union its comprehensive non-economic package, which replaced its earlier proposals. The parties engaged in extensive discussion of the Employer's package, with the Union contending that the Employer had not made sufficient movement in its positions and that the Employer's local management appeared to be standing in the way of achieving an agreement. The parties also engaged in a contentious discussion of the Employer's proposal for mandatory overtime, which the Union contended was unprecedented and could appear to employees as punishment for changing to fixed shifts. The Employer argued that its primary concern was simply to ensure that necessary work was covered.

In the bargaining sessions that followed on June 22 and 23, the parties engaged in extensive discussion of the Employer's non-economic proposal. On June 22, the Union expressed its continuing concerns that local management was standing in the way of an agreement, which could result in the parties submitting unresolved issues to the next level under Letter 50, and that

the employees did not trust local management. The Employer responded that it understood the Union's concerns, that its proposal was simply a "first pass" at a package, not a final offer, and that the parties would both be better off by reaching agreement and not undergoing the uncertainty of an arbitrator's decision under Letter 50. The Union reiterated that there could be no agreement without a fixed shift or one that included mandatory overtime. The Union then provided a verbal response to the Employer's non-economic package and offered a written proposal on subcontracting.

On June 23, the Employer began by stating that this was "a process of compromise and that a lot of progress can be made in a short period of time." The parties then engaged in an extensive discussion of fixed shifts. In response to the Union's concerns about local management's position on this issue, Employer representative Hense stated that he had no problem with going to a fixed shift and that he was confident that the parties could find a solution, but that the Employer needed assurances about the ways in which any production problems would be addressed. Hense further said that this was a big change from the status quo and that the Employer wanted to get something in exchange, and that, although the issue was a difficult one, he believed that the parties could reach agreement if they continued to discuss their issues at the table. Both the Employer and the Union agreed that there was a real danger in letting a third party be the arbiter of their contract, and that issues were best resolved at the table.

The parties met again on June 28 and 30 and July 1. In the first bargaining session, the Union presented its counterproposal to the Employer's non-economic proposal, and included a proposal on minor economic issues relating to insurance benefits, the attendance recognition system and pension service awards. The Union also offered the Employer its counterproposal on Letter #1, which included changes made by the Union to address various concerns of the

Employer, including labor turnover. The parties agreed that they were very close to an agreement on the fixed-shift schedule issue. As a means to achieve final agreement on this issue, the Union suggested that mandatory overtime could be used for a brief period following the switch to a fixed-shift schedule and that a task force could be set up to address any ongoing production concerns that arose from the transition. The parties had an extensive discussion on other topics, including unit employees' performing some of the tasks that first line supervisors performed, as well as mandatory overtime, and pay issues related to the 12-hour shift. The Employer noted that, despite its view on the limited scope of a first contract, it was offering a package that went beyond the status quo in order to get an agreement. The Union stated that if the parties could resolve the fixed shift issue, then the Union could give the Employer its total package. Both the Union and the Employer again expressed their desire to come to an agreement, rather than ceding matters to a third party.

On June 30, the Employer presented the Union with an economic package, excluding wages, as well as a package of non-economic proposals that the parties were close to an agreement on. As the parties were reviewing this package, early in the session, Employer representative Hense raised the issue of logistics and said that the parties were not likely to need the meeting room after the following day. Union representative Buzaki responded that he agreed, as he didn't think things were productive and that it appeared that local management was trying to destroy the negotiations. Buzaki added that the Union was "looking to kicking it up after 90 days," presumably a reference to submitting matters to the parties' chairs and then to arbitration for resolution. Hense responded by stating that he thought the parties had made a lot of progress, and Buzaki then agreed to this assessment. Hense then explained that he was not going to be able to travel to Statesville until after Labor Day due to doctor's orders, as he was going to be

undergoing a course of treatment for a serious medical condition. He stated further that he would be able to keep things going from his office in Ohio.

The parties then engaged in further review and discussion of the Employer's counterproposal. The Employer had moved toward the Union's position in some areas such as the time paid for holidays that fell on an employees' regularly scheduled workday. The parties continued to remain apart on areas such as the Employer's desire for mandatory overtime, and its insistence on maintaining the pension plan as a defined contribution plan. [8]

The parties met the next day and discussed their views on the remaining stumbling blocks with respect to non-economic issues, which included mandatory overtime, the Employer's ability to revert back to a rotating shift, and layoff and recall language. The parties acknowledged that they were not far apart on economic issues except for issues related to the kind of pension plan that would be provided and issues related to cost of insurance. The parties discussed a variety of other topics including the Union's desire to limit supervisors from doing bargaining unit work, contracting out, mandatory overtime, holiday pay, new hire progression, and the length of the probationary period. Mandatory overtime remained a contentious subject, and the parties discussed various solutions to the overtime issue. At the end of the session, the Employer agreed that it would continue to review its positions to see if it could find ways to solve problems without being offensive to the Union's membership, and that it believed that negotiations could be wrapped up in a week if the Union agreed to do the same. The Union agreed, wished the Employer representative well in his medical treatment, and stated that it might bring its committee up to Ohio.

[8] The Employer had a defined contribution plan, under which employees could make contributions to their individual retirement accounts, and the Union was seeking a defined benefit plan, which provided more certainty in regard to retirement income. To that end, the parties' actuaries spent considerable time away from the bargaining table reviewing pension plans. The record does not disclose specifically when this occurred.

During mid-to-late July, Hense and Buzaki discussed some bargaining issues by telephone, and in July and August, Buzaki traveled to Statesville on a few occasions to discuss issues with the Union negotiating committee. On July 21, 2004, the Union sent Hense an entire contract package. On July 26, 2004 and August 19, 2004, Hense responded with comprehensive counterproposals.

On August 26, 2004, the negotiating committees met again for the first time since July 1, 2004. Hense participated by telephone. During this session, the parties discussed the costs of switching to a fixed shift.

On August 31, 2004, the Union sent the Employer a comprehensive counterproposal to the Employer's counterproposal of August 19, 2004. The Union indicated its disagreement by making deletions and adding language to the Employer's counterproposal. The parties were in agreement on the following clauses: Agreement and Witnesseth; Scope of Agreement (Article II); Management Clause (Article III); Grievance Procedure (Article V); Reporting Pay (Article VII); Miscellaneous Clauses: Nondiscrimination, Jury Duty Pay, Funeral Leave Pay, Union Bulletin Boards, Policies and Procedures, Journeyman Cards (Article X); Employee Savings Plan (Article XV); and Letter #2 (setting out the parties' joint commitment to a high performance organization). The parties had some differences with respect to the Recognition Clause (Article I); General Wage Provisions (Article VI); Seniority (Article IX); Miscellaneous Clauses: Safety and Health, Distribution of Collective Bargaining Agreement (Article X) and Letter #1. The parties had major areas of disagreement with respect to Dues Checkoff (Article IV); Vacations (Article XVIII); Miscellaneous Clauses: Subcontracting, Assignment of Work, and Control of Operations (Article X); No Strike/No Lockout Provisions (Article XI); Insurance (Article XII);

Pension (Article XIII); Disability Insurance (Article XIV); Effective Date, Amendment, and Termination (Article XVI); and Letter #3 (dealing with mandatory overtime).

On September 3, 2004, the Petitioner filed a decertification petition.

F. The Bargaining Sessions After September 3

Following September 3, the parties met a total of three bargaining sessions. On September 28, the parties met with Hense in attendance in the first full face-to-face negotiating meeting since July 1. Hense remarked that they would like to wrap things up that week and that compromise was preferable to arbitration for everyone. Hense stated that the Employer was prepared to give a package that exceeded the status quo but if it went to arbitration, it would submit a lesser package. The parties discussed issues that still divided them such as mandatory overtime, dues checkoff, vacation, overtime for holiday pay, and pension and insurance issues. The Employer made a commitment to go to a fixed shift as soon as possible pending the employee vote on the issue.

On September 29, the parties met and reached agreement in certain areas that had divided them. For example, the parties agreed to limited mandatory overtime during the 90-day period following the switch to a fixed shift, agreed to continue the defined contribution pension plan, and agreed to the Union's dues checkoff proposal.

During the session on the 29th, the parties remained divided on the health insurance premium issue. With respect to the employee's share of the co-premium, the Union sought a 5% co-premium—the rates employees were currently paying—while the Employer wanted a 25% co-premium. At one point, the Employer informed the Union that a 17% share for employees was as low as the Employer could go. The Union responded that it could not agree to that, and the parties discussed scheduling an arbitrator. The session ended about 11:00 p.m. In the early

morning hours following that session, the Union committee prepared a counterproposal on the remaining areas of disagreement, which it mailed to the Employer on October 5.

Following this session, and before November 16, the Employer implemented a corporate-wide policy concerning the amount of co-premium paid by employees. On November 16, at the parties' last bargaining session, the parties agreed that the employees' share of the health insurance premium for 2006 and 2007 would be capped at the lesser amount of 8% or the amount of premium paid by salaried employees. The parties reached agreement that day with respect to all remaining issues, thereby reaching a complete agreement. Thereafter, the Union's membership ratified the parties' agreement on November 19.

II. ANALYSIS

A. Whether the Parties Were Afforded a Reasonable Period of Time in Which to Bargain

Under the Board's voluntary recognition bar, first articulated in Keller Plastics Eastern, Inc., 157 NLRB 583, 587 (1966), "the parties must be afforded a reasonable time to bargain" following voluntary recognition. This rule creates a period of industrial repose during which the employer is obliged to recognize and bargain with the incumbent union. Imposing a "reasonable period" in the voluntary recognition context enables a union to establish a relationship with the employer and serves to insulate it from withdrawals of recognition and election petitions during a vulnerable period. In applying this standard, "the Board seeks to balance the competing interests of effectuating employee free choice, while promoting voluntary recognition and protecting the stability of collective-bargaining relationships." Ford Center for the Performing Arts, 328 NLRB 1, 1 (1999).

There are no hard and fast rules concerning what constitutes a reasonable time as "each case must rest on its own particular facts." Lee Lumber & Building Material Corp., 322 NLRB 175, 179 (1996), enforced in relevant part and remanded, 117 F.3d 1454 (D.C. Cir. 1997). "[A] 'reasonable time' does not depend on either the passage of time or on the number of meetings between the parties, but instead on what transpired and what was accomplished during the meetings." Lee Lumber, 322 NLRB at 179. Accord Ford, 328 NLRB at 1. In analyzing whether a reasonable time has transpired, the Board examines the following factors: (1) the degree of the parties' progress during negotiations; (2) whether the parties are at impasse; and (3) whether the parties are bargaining over an initial contract. Lee Lumber, 322 NLRB at 179; MGM Grand Hotel, Inc., 329 NLRB 464, 466 (1999). The Board has also observed that "the determination of whether a reasonable time has elapsed cannot be made prospectively, but can only be made after an examination of the bargaining history." Exxel-Atmos, Inc., 323 NLRB 888, 889 (1997), enforced in relevant part, 147 F.3d 973, 975 (D.C. Cir. 1998), cert. denied, 525 U.S. 1067 (1999).

With respect to the Board's first factor, the parties' progress during negotiations, the record reflects that approximately 6 months and 3 weeks elapsed between the Employer's voluntary recognition and the filing of the petition. During that time, the parties held 20 face-to-face sessions, including an initial introductory grounds rules session, and one telephonic bargaining session. For approximately two months of this time, the parties were not able to conduct face-to-face meetings, because of the medical needs of the lead Employer representative. By the time the decertification petition was filed on September 3, however, the parties were exchanging entire contract proposals and had reached complete agreement in a number of areas, and were close to agreement in other areas. Even more significant, the parties had engaged in substantive and detailed negotiations over a particularly complex issue that involved completely

changing the way in which the Employer had historically structured its work schedule. Moreover, notwithstanding obvious moments of frustration in the bargaining process, and despite some statements concerning moving negotiations to the next level under Letter 50, the parties consistently emphasized their shared commitment to reach agreement at the table and to refrain from submitting issues to any higher levels.

To be sure, as the Petitioner urges, the parties remained divided on a number of issues. However, the Petitioner's argument ignores that in a bargaining session on June 28, a few days before face-to-face negotiations temporarily ceased in light of the required medical treatment of the chief Employer representative, the parties acknowledged that they were close to agreement on Letter #1, which governed the complex operational changes related to changing to a fixed shift. From the Union's point of view, establishing a fixed shift was a prerequisite to obtaining an agreement. Some of the movement in this area appears to have been facilitated by the Union's willingness to alleviate the Employer's concerns by agreeing to limited mandatory overtime for a brief period during the transition between a rotating and fixed shift, and to establish a task force to address any production issues that arose as a result of moving to a fixed shift. The significance of the parties' progress in this area cannot be overstated. Not only was establishing a fixed shift the centerpiece of the Union's agenda, but the issue itself was complex, with significant impact on a number of other areas, such as seniority, training, overtime, and job postings.

In addition, in asserting that the parties had made little progress by September 3, the Petitioner relies on events that transpired after the petition was filed, including that the parties did not reach agreement until two and a half months later. The Petitioner further speculates that the parties reached agreement solely as a result of the decertification petition. There is no merit to

the Petitioner's arguments as events occurring after the petition was filed are simply not relevant to the question whether a reasonable time to bargain had passed as of September 3.[9]

Analysis of the unique factual situation here provides further support for the conclusion that the parties had not been afforded a reasonable time to bargain as of September 3. That is, several logistical obstacles served to prolong negotiations. First, before negotiations even started the Union required approximately one month to educate its members, select a bargaining committee, and formulate proposals in preparation for bargaining a first contract. The length of that process was due, in part, to the continuous production schedule of the Employer's operation, which necessitated multiple meetings to ensure participation. Second, the parties agreed to meet a maximum of three days a week as a means to mitigate any negative impact on the Employer's production that could result from the absence of the various negotiating committee members from the plant. Third, the location of the negotiating sessions at the Employer's location in Statesville, North Carolina, required that the parties' chief negotiators travel from out-of-state for each session. Fourth, and most significantly, during negotiations, the Employer's chief negotiator became seriously ill, which limited his availability to travel and prevented the parties from having face-to-face meetings for the two months immediately preceding the filing of the petition. During this period, although the parties continued to exchange proposals and telephone calls, the bargaining momentum understandably slowed.

As Petitioner argues, during sessions in late June, shortly before face-to-face meetings entered the bargaining hiatus, the Union did communicate a distrust of local management. Nevertheless, the parties continued to meet, and both sides expressed the view that they had made

[9] In any event, Petitioner's argument that little progress was made up until the petition was filed is belied by the fact that the parties required only three face-to-face meetings once negotiations resumed on September 28, to iron out remaining differences and to reach final agreement. Petitioner's further suggestion that the decertification petition

progress and would continue to communicate during the hiatus. The two-month delay from July 1, when face-to-face negotiations were suspended until September 3, when the petition was filed, clearly did not result from any bargaining difficulties, but rather, resulted from events beyond the parties' control. Moreover, the parties' conduct during negotiations largely reflected a spirit of cooperation and a strong determination from the outset and throughout negotiations to reach an agreement independent of third party intervention. See generally, MGM, 329 NLRB at 467 (in finding that a reasonable time for bargaining had not elapsed, the Board observed that "it is clear that the parties were diligent in their efforts to reach agreement, never reached impasse, and consistently expressed their desire to complete the negotiations and execute a contract").

With respect to the Board's second factor, which examines whether the parties were at impasse, it is undisputed that the parties had not reached impasse at the time that the decertification petition was filed on September 3.[10] Indeed, a few days before, on August 31, the Union had mailed an entire contract proposal to the Employer, showing areas of agreement and disagreement, in response to the Employer's proposal dated August 19. Thereafter, the parties held a telephonic session on August 26, to discuss the costs of operating under a fixed shift.

With respect to the third factor, there is also no dispute that the parties were negotiating an initial agreement. The Employer opposed placing the Statesville facility under the Master

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itself caused the parties to reach agreement is similarly speculative and unavailing as the insurance co-premium issue, a major stumbling block to agreement, was resolved in the interim.

[10] The record reflects that the parties never reached impasse at any time during the negotiations. The closest the parties came to impasse was on the night of September 29, 2004, when the Employer indicated that 17% was the lowest it could go on the employees' share of their health insurance premium, whereas the Union was holding out for 5%, the present share that employees were contributing. Even then, in the early morning hours after that session ended, the Union drafted a counterproposal on all remaining issues, which it mailed to the Employer a few days later. In any event, these events occurred after the petition was filed and are, therefore, not relevant.

Agreement in the first instance; accordingly, the parties were required to negotiate an agreement effectively from scratch. "In particular, where the parties are negotiating a first contract, the Board recognizes the attendant problems of establishing initial procedures, rights, wage scales, and benefits in determining whether a reasonable time has elapsed." Ford, 328 NLRB at 1. See also N.J. MacDonald & Sons, Inc., 155 NLRB 67, 71-72 (1965). In that regard, I note, as examples, the parties' efforts with respect to moving to a fixed shift and its widespread impact on the Employer's operations, and the parties' deliberations regarding changing from a defined contribution pension plan to a defined benefit pension plan.

Finally, there is no merit to Petitioner's argument that the time for bargaining here surpasses the duration that the parties themselves considered a reasonable time for bargaining. In that regard, Petitioner points to the provisions of Letter 50 which provide that binding arbitration is available within 120 days following recognition if the parties have failed to reach agreement. Contrary to the Petitioner's assertions, Letter 50's permissive language provides only that the parties may submit matters to arbitration at that point. Thus, the contract imposes a floor, not a ceiling, for the parties to seek arbitration. And, as emphasized above, the parties repeatedly acknowledged their desire to avoid arbitration, and to continue negotiating as long as they believed they could achieve agreement.

In conclusion, the critical issue is whether, as of September 3, the parties had been given a "fair chance to succeed." Franks Bros. Co. v. NLRB, 321 U.S. 702, 705 (1944). Based on the foregoing circumstances, I conclude that they had not, and, accordingly, I shall dismiss the petition. See generally Ford, 328 NLRB at 1-2 (9 months did not constitute a reasonable time to

bargain in light of the parties' progress in negotiations and the difficulty of negotiating an initial contract).

B. The Evidence Regarding the Employer's Voluntary Recognition of the Union Based Upon a Showing of Majority Support

Petitioner argues that the Union has failed to show affirmatively that the Employer recognized it based on a showing of majority support. The record establishes the contrary. That is, the record establishes that the parties were signatory to a master agreement that contained a neutrality clause applicable to any organizing campaign conducted by the Union at any of the Employer's unrepresented facilities. This clause provided that the Employer would recognize the Union as exclusive collective bargaining representative of the employees at the relevant facility upon a showing, verified by a neutral third party, that the Union was supported by a majority of employees in the bargaining unit. This provision was made a part of the record.

As set out above, the Union invoked this clause when it began an organizing campaign at the Employer's Statesville facility. On February 9, the Union submitted signed authorization cards to a neutral arbitrator, who thereafter certified that the Union had secured the support of a majority of employees in the bargaining unit. Subsequently, the Employer voluntarily recognized the Union.

Petitioner concedes in his brief that, in this representation context, the Board will not analyze whether the Union enjoyed the uncoerced support of a majority of unit employees. Petitioner contends, however, that the record does not establish the facts set out in the preceding paragraph by "hard evidence." Thus, Petitioner appears to argue that the record evidence is of insufficient kind or quality to establish that the Employer recognized the Union based on a showing of majority support. In support of this argument, Petitioner cites a number of cases, all

of which are inapposite. In Sound Contractors Assn, 162 NLRB 364, 365 (1967), the Board found that the record failed to support the requisite elements when the only proof of recognition based on majority status was a bare recognition clause in collective bargaining agreements negotiated between the employer and the union. In Josephine Furniture Company, 172 NLRB 404, 405 (1968), the Board observed that the record contained no evidence at all that authorization cards had been checked at any time to verify majority status.

In contrast to the foregoing cases, the operative facts here are established by both documentary and testimonial evidence, namely, the neutrality clause setting out the card check procedures that were to be followed, and the testimony of Union representatives Buzaki and Johnsen, who testified that a neutral arbitrator conducted a card check and verified that the Union had majority support, after which the Employer recognized the Union. In addition, Petitioner himself offered into evidence various Employer postings, which state that the Employer had been informed by the Union that it had achieved majority support and that the cards were to be submitted to a named arbitrator for verification. I find, therefore, that it has been shown affirmatively that the Employer extended voluntary recognition to the Union based on proof of majority support.

C. The Board's Bar Doctrine in the Context of Voluntary Recognition

As set out above, the Board consistently has applied the bar doctrine in situations involving voluntary recognition. See, e.g., Ford Center for the Performing Arts, supra. Petitioner's argument that the doctrine should not apply here is, therefore, unprecedented and unavailing.

III. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. The Union involved claims to represent certain employees of the Employer.
4. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6)(7) of the Act for the reasons set out above.

IV. ORDER

IT IS HEREBY ORDERED that the petition herein be, and it hereby is, dismissed.

V. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by 5:00 p.m., EST on February 28, 2005. The request may not be filed by facsimile.

Dated at Winston-Salem, North Carolina, on the 14th day of February, 2005.

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Willie L. Clark, Jr., Regional Director
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